No. 10-397

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

HEATHCLIFFE JOHN BRADLEY,

*Petitioner,*

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF

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## REPLY BRIEF

Respondent's position in his opposition brief, that an immediate relative of an American citizen who overstays the terms of his admission to the United States under the Visa Waiver Program ("VWP") may file an application for adjustment of status but may not "contest removal" by seeking a simple review of such application before an Immigration Judge, is perplexing. In so arguing, Respondent seemingly departs from the holdings of the Third Circuit and other Courts of Appeals, which have held that a VWP entrant is "contesting removal" when he attempts to adjust his status any time after the 90-day period of authorized stay, elucidating the general uncertainty surrounding the issue of what actions constitute an impermissible "contest [of] . . . any action for removal." 8 U.S.C. § 1187(b). In conceding that a VWP entrant may file an adjustment of status application outside the 90-day period, Respondent fails to explain why simple review of the application by an Immigration Judge should constitute a defense to removal. Petitioner maintains that, possessing the right to file an adjustment of status application outside of the 90-day period, a VWP entrant should be entitled to simple procedural review and that this process should no more be considered a defense to removal than the application itself.

Owing to the significant confusion surrounding the appropriate procedure for the adjudication of adjustment applications filed by immediate relative VWP entrants who overstay and the fact that a substantial number of American citizens and their spouses are affected by the clear resolution of the issue, this Court should grant review.

1. The Respondent claims that there is no Circuit Court split and that there is no solid evidence that USCIS has inconsistently adjudicated the AOS applications of VWP entrants. However, at a closer look, the Circuit Courts of Appeals do indeed differ in dealing with this issue when addressing the procedural rights of AOS applicants. As a result, USCIS continues to inconsistently adjudicate these applications depending on the AOS applicant's residence, which establishes its jurisdiction. Consequently, due to this lack of uniformity in applying the federal laws and immigration policy, a fundamental principle espoused by Congress in enacting federal immigration laws, the varying Circuit Court decisions continue to negatively impact thousands of families across the United States.

2. In his opposition, Respondent states that no conflict is presented regarding Petitioner's *eligibility* for adjustment of status because "[t]he court of appeals did not opine on whether petitioner remains eligible for United States Citizenship and Immigration Services ("USCIS") to grant him adjustment as a matter of discretion." Opp. 14-15. Respondent's interpretation of the Third Circuit's holding is misconstrued. In fact, the Third Circuit in *Bradley v. Attorney General*, 603 F.3d 235 (3d Cir. 2010), quoting the Seventh Circuit, stated that,

> During the time when a nonimmigrant visitor is within the VWP's 90-day window, she may submit an adjustment-of-status application based on an immediate relative. *An application submitted at that time would not represent a challenge to removal.* After the

> visitor overstays her 90-day visit, however, the effect of the VWP waiver kicks in, preventing any objection to removal (except for asylum), including one based on adjustment of status.

*Id.* at 242 (citing *Bayo v. Napolitano*, 593 F.3d 495, 507 (7th Cir. 2010) (en banc) (emphasis added). The Court added that "[A]lthough [Petitioner] was once statutorily eligible under 8 U.S.C. § 1255(c)(4) for the adjustment he now seeks, he may not, after the expiration of his 90-day stay, adjust his status as a defense to removal." *Ibid.* Finally, the Court determined "that [Petitioner's] VWP waiver forecloses him from contesting his removal via a petition for adjustment of status." *Id.* at 242-3.

The language employed by the Third Circuit (and indeed by the other Courts of Appeals to address this issue) strongly suggests that the Court considers *any* adjustment application submitted after the expiration of the 90-day stay to constitute an impermissible challenge of removal. Nowhere did the Court imply that its usage of the phrase "defense to removal" was, as Respondent proposes, limited to Petitioner's "attempt to obtain judicial review of the [removal order] and to use adjustment as a means of avoiding removal." Opp. 12. Not one of the seven Courts of Appeals to have spoken on the issue of VWP waivers has suggested that a VWP entrant is eligible to receive an adjustment of status when an application has been filed after the expiration of the 90-day period, as Respondent concedes. Opp. 15. Further, USCIS has repeatedly flipped on the issue, occasionally denying Petitioner's

adjustment applications on discretionary grounds and at other times on the basis of ineligibility.[1]

Contrary to Respondent's assertions, Petitioner's eligibility to have his adjustment of status application adjudicated and reviewed is at issue in this case.

3. In asserting that "a VWP alien who is an immediate relative may seek adjustment of status *outside* removal proceedings," Opp. 10, Respondent unravels the reasoning of the Courts of Appeals. If Petitioner's application for adjustment of status constitutes an application for relief that is statutorily available and not a defense to removal, it follows that merely seeking review of a denial of an adjustment application before an Immigration Judge should similarly be considered a simple review and not a challenge to removal.

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1. When USCIS reconsidered (notably, after the filing of this Petition for Writ of Certiorari) its prior denial of Petitioner's *second* adjustment application requesting *nunc pro tunc* adjudication, it first found Petitioner "ineligible for adjustment of status" based on the Third Circuit's decision in *Bradley*. 1 Nov. decision, Resp. App. 19a. (Petitioner's second AOS application was filed not as a relief from removal, as the Respondent would like this Court to believe, but a way to cure the procedural issues, which prevented his first AOS application to be decided on the merits.) Curiously, within three weeks, USCIS withdrew this decision *sua sponte* and issued an order denying reconsideration as a matter of discretion. 18 Nov. decision, Resp. App. 2a, 14a-15a. Even more confusing is the fact that Petitioner's application fails "as a matter of discretion" almost exclusively for factors consisting of and related to his unauthorized employment and overstaying the terms of his admission, while these factors are express statutory exceptions to his ineligibility for adjustment. *See* 8 U.S.C. § 1255(c)(2), (4).

Further, it remains illogical to consider judicial review of an adjustment application filed before a removal order is even issued to be an impermissible defense to removal simply because an application is filed outside the 90-day period. Certainly, an application filed after a removal order has been issued, as in *Momeni v. Chertoff*, 521 F.3d 1094 (9th Cir. 2008), can be construed as a defense to removal;however, where no efforts at removal have been made, no proactive measures to legitimize one's status can be considered a "defense" to removal. In drawing a line between adjustment applications filed before and after the 90-day mark, the Courts of Appeals appear to have considered any application filed after the 90-day period to constitute a "defense to removal." With Respondent's concession that a VWP entrant may seek an adjustment of status after the 90-day mark, any reasonable distinction between the treatment of such applications and applications filed before the 90-day mark disappears. Respondent offers no explanation as to why review before an Immigration Judge within the 90 days should not be considered "removal proceedings" but the same review process afterwards should be.

If Petitioner is indeed eligible to seek an adjustment of status after the 90-day period, the procedure should be akin to that adopted in *Freeman v. Gonzales*, 444 F.3d 1031, 1095 (9th Cir. 2006). In *Freeman*, the Ninth Circuit stated, "once [the applicant and her spouse] initiated the adjustment of status process by filing the necessary forms, her right to remain in the United States and to challenge any adverse decision became subject to procedural protections governing adjustment of status applications." *Id.* at 1034. According to the

Ninth Circuit, the procedural benefits include the applicant's right to renew his or her application if it has been denied, as Petitioner's was. *Id.* at 1035; 8 C.F.R. § 245.2(a)(5). If an adjustment application is renewed after removal proceedings have begun, the applicant is entitled to review before an Immigration Judge.[2] *Id.*

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2. Respondent notes that a denial of an I-130 cannot be "appealed" to the Board of Immigration Appeals when the petition is deemed abandoned and is denied for that reason. Opp. 4; 8 C.F.R. § 103.2(b)(15), 103.3(a)(1)(ii), 1003.1(b)(5). Respondent does not mention, however, the confusion that led to the denial of the I-130 in Petitioner's case.

Petitioner filed a timely request to have his adjustment of status interview rescheduled and USCIS, after failing to notify Petitioner that his interview would not be rescheduled, denied his initial I-485 and I-130 without deciding it on the merits. Pet. App. 20a-23a. That initial I-485 was filed *prior to the order of removal* being issued against him by Immigration and Customs Enforcement. Had the case been decided on the merits, Petitioner would likely be a U.S. permanent resident at this point. At that point, USCIS informed Petitioner that he should depart from the United States or be subject to "removal proceedings", and informed Petitioner's American citizen spouse that she would be permitted to *appeal* the decision to the Board of Immigration Appeals ("BIA") within thirty (30) days. *Id.* at 20a. Petitioner's attorney, following the directions of USCIS, filed an appeal of the decision to deny the I-130 and I-485. The BIA denied this appeal for lack of jurisdiction pursuant to 8 C.F.R. § 103.2(b)(15), but found that the Field Office Director *erroneously* informed the petitioner (Cheryl Losee) that she had 30 days to appeal her decision to the BIA. The government's mistakes and inconsistencies in handling these matters only support the Ninth Circuit's approach in *Freeman* to afford procedural protections governing adjustment of status applications filed by immediate relatives of American citizens, who are VWP overstays.

In sum, the parties agree, in contrast to the Third Circuit's holding, that Petitioner, as an immediate relative of an American citizen, is eligible to file an application for adjustment of status even once he has fallen out of status. Petitioner maintains only that he should be entitled to the procedural protections that typically accompany the filing of an adjustment application, a process entirely distinct from any "removal proceedings" that may later be filed.

4. Respondent maintains that even if Petitioner is removed, he may secure lawful permanent resident status by seeking an immigrant visa and the appropriate waivers from abroad. Opp. 14 n .11. While this bare assertion is correct, Respondent fails to mention that Petitioner's removal will result in a ten year bar on his return, 8 U.S.C. 1182(a)(9)(B)(i), waivable only by the Attorney General on a showing of "extreme hardship" to the American citizen spouse. 8 U.S.C. § 1182(a)(9)(B)(v).

In immigration law, "extreme hardship" is "not a definable term of fixed and inflexible meaning, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999), *aff'd*, *Cervantes-Gonzalez v. INS*, 244 F.3d 1001 (9th Cir. 2001). The standard for establishing "extreme hardship" is high; the factors to be considered include, but are not limited to:

> the presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties

> outside the United States; the condition in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

*Id.* at 566.

As the VWP countries are "favored," *Freeman v. Gonzales*, 444 F.3d 1031, 1035 (9th Cir. 2006), and predominantly Western, a VWP citizen is likely to have serious difficulty demonstrating "extreme hardship." In effect, therefore, the process of returning to the United States and acquiring lawful permanent resident status is hardly as simple and straightforward as Respondent suggests and is indeed improbable for Petitioner and for anyone similarly situated.

## CONCLUSION

The petition should be granted.

Respectfully Submitted,

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